Subject Index

	Page
Question presented	1
Statement	2
Argument	2
1. No claim had accrued to the United States under the Hartford Insurance policy	2
2. There is substantial authority that although state statutes of limitation do not apply to the United States, where the United States seeks recovery on a right which originated from special state statute, which right did not exist at common law, the United States is bound by the time specified in such statutes in which an action must be brought	6
3. The distinction between non-claims statutes and statutes of limitations is not one of form but of substance	8
Conclusion	9

Table of Authorities Cited

Cases	Pages
Adams v. Albany, 80 F.Supp. 876	8
Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123	5
Denver and R.G.R. Co. v. U.S., 241 F. 614	7
Firemen's Insurance Company v. Disken, 255 C.A.2d 502, 63 C.R. 177	3, 8
Flintkote Co. v. United States, 47 F.R.D. 322 (S.D.N.Y. 1969)	8
Pacific Indemnity Co. v. Ornellas, 269 C.A.2d 875, 75 C.R. 608	3, 8

Pages

Republic Indemnity Co. v. Barn Furniture Mart, 248 C.A. 2d 517, 56 C.R. 609 8

United States v. Eytcheson, 237 F.Supp. 371 (DC Mont. 1965) 8

United States v. Fort Benning Rifle and Pistol Club, 387 F.2d 884 (5th Cir. 1967) 4

United States v. Magnolia Motor and Logging Co., 208 F. Supp. 63 (DC Cal. 1962) 8

United States v. Summerlin (310 U.S. 343) 4

Codes

Insurance Code, Section 11580.2(i) 2, 6

28 U.S.C., Section 2415(a), (b) 6

Texts

61 A.L.R., p. 412 6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-59

UNITED STATES OF AMERICA,
Petitioner

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Where state statute creates a duty on insurance companies to provide Uninsured Motorist coverage in vehicle liability policies, which statute further provides "No cause of action shall accrue" unless within one year of the date of the accident the insured shall institute arbitration, or conclude agreement as to amount due or file suit against the uninsured motorist, is such one year period controlling upon the United States?

STATEMENT

Respondent adopts the statement of facts of the petitioner with the following corrections and additions. The District Court and the Court of Appeals found that the one year provision contained within the California Statute was not a Statute of Limitations, but rather a condition precedent to the accrual of a cause of action. The coverage acquired by Mr. and Mrs. Rogers for protection against Uninsured Motorists is required by California Insurance Code Section 11580.2 (i). (See Petitioner's Brief, page 2.)

ARGUMENT

Petitioner's Brief cites the following reasons why a Writ of Certiorari should be granted in this case: (1) that the holdings by the lower Courts fly in the face of the settled principle that the United States is not bound by State imposed time limits for asserting its rights—no matter what such restrictions might be called; and (2) that the Court of Appeals distinction between a statute which precludes the creation of a cause of action unless a condition precedent thereto is met, and one which extinguishes the cause of action after it has accrued unless a time limit is met, is a distinction made in form, not substance.

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1. NO CLAIM HAD ACCRUED TO THE UNITED STATES UNDER THE HARTFORD INSURANCE POLICY

This was the primary basis for the holding of the District Court and Court of Appeals. The Insurance

Code section created a statutory duty on all insurance companies unknown at common law but such duty was not without limit. In providing that "No cause of action shall accrue" unless the insured instituted arbitration, filed suit, etc., within one year from the date of the accident, the statute defined the liability of the insurance company. Thus, for example, in *Firemen's Insurance Company v. Disken,* 255 C.A. 2d 502, 63 C.R. 177, the tort-feasor's liability insurance carrier became insolvent fourteen months after the accident and the insured contended that since the tort-feasor was thereby "uninsured" he was entitled to Uninsured Motorist coverage under his own insurance policy. This argument was rejected by the California Court on the ground that the insured's cause of action did not accrue within the one year period, and therefore could not constitute a claim for which the insurance company could be liable.

In *Pacific Indemnity Co. v. Ornellas,* 269 C.A.2d 875, 75 C.R. 608, it was held that the absence of the uninsured motorist from the State following the accident did not affect the one year requirement. It noted various decisions stating that this one year proviso was not tolled by reason of the minority of the insured, and added:

> "The rationale of the decisions is that the Insurance Code subsection defines timely suit, agreement or arbitration as absolute conditions precedent to the enforcement of Uninsured Motorist coverage . . . in *Williams v. Los Angeles Metropolitan Transit Authority,* 68 C2d 599, 68 CR 297 . . . the court (stated) . . . that Subdivision (H)

> 'creates a condition for the preservation of a potential cause of action under an insurance policy and does not fix the time for instituting a civil suit against the insurer after a cause of action has accrued' . . . That is, the tolling statutes of the Code of Civil Procedure will apply to extend the life of a cause of action *already accrued,* but are not to be used to lengthen the time during which an injured party may meet the conditions precedent to the accrual of his cause of action under the Uninsured Motorist statute in the first instance."

As stated in *United States v. Fort Benning Rifle and Pistol Club,* 387 F.2d 884 (5th Cir. 1967), "Limitation has nothing to do with whether the circumstances surrounding the injury create a tort liability in that third person." Thus, here, there *is* no liability on the part of Hartford absent arbitration, agreement or suit within one year of the accident.

It was on the basis of this distinction that the District Court held, and the Court of Appeals affirmed, that the case of *United States v. Summerlin,* 310 U.S. 343, was not applicable, the Memorandum and Order stating, "Of decisive importance in *Summerlin* is the fact that the claim *had accrued* (emphasis added) to the United States before the State statute purported to cut it off . . . Neither it nor its progeny, however, stands for the proposition that considerations of Federal supremacy can *create* a cause of action in the government where none exists under State law . . . *Summerlin* cannot be stretched to create a right in the government to sue under State law without com-

plying with the conditions precedent to the accrual of the action".

This honorable Court dealt with a similar problem in the case of *Chesapeake & Delaware Canal Co. v. United States,* 250 U.S. 123. Therein the government sued to collect dividends due them as stockholders in the defendant corporation. A State Statute of Limitations was involved, and the argument raised that since the government had become partners in the business the government had to abide by the limitations levied on ordinary business activities. This honorable Court rejected the contention and observed:

> "If the government were asserting any rights with respect to the conduct of the corporation affairs, its contracts or its torts, then its rights, duties and privileges would be no greater than that of any stockholder. But here the government is pursuing a right to recover, which is not affected by its relation to the corporation as a stockholder. The declaration of the dividends, which is admitted, gave it the status of a creditor, and thereafter the right to recovery was unaffected by any stockholder relation. *To this must be added that the statutes and rules of limitation relate to the remedy to enforce the right, and not to the corporate relation from which the rights spring. . . .*" (Emphasis added.)

Certainly the government has no greater right under the insurance contract as an insured than do Mr. and Mrs. Rogers, who purchased the policy. The government can, in this case, only pursue a right as an insured through its relationship with the insur-

ance company. The one year condition regarding filing suit, etc., is not a remedy cutting off the rights as an insured, but it is in fact the very foundation from which the right springs.

Finally, consider the very statute that the government relies upon, i.e., 28 U.S.C. 2415. Both sections (a) and (b) refer to the time limits after which their claims will be barred. All such times begin from the time a *right of action accrues*. In short, Congress recognized that there had to be a viable claim before such a limitation could begin. California Insurance Code Section 11580.2 (i) simply states that such a required cause of action does not accrue unless one of the three things is done within a year's time. Certainly once the cause of action accrues then 28 U.S.C. 2415 controls. The government did not fulfill the conditions precedent required by the California Insurance Code. No cause of action on their behalf ever accrued.

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2. THERE IS SUBSTANTIAL AUTHORITY THAT ALTHOUGH STATE STATUTES OF LIMITATION DO NOT APPLY TO THE UNITED STATES, WHERE THE UNITED STATES SEEKS RECOVERY ON A RIGHT WHICH ORIGINATED FROM SPECIAL STATE STATUTE, WHICH RIGHT DID NOT EXIST AT COMMON LAW, THE UNITED STATES IS BOUND BY THE TIME SPECIFIED IN SUCH STATUTES IN WHICH AN ACTION MUST BE BROUGHT.

In "State Statutes of Limitations as Affecting Actions or Proceedings by Federal Government or its officials", 61 A.L.R. 412, it is stated "That where the State statute creates a right that did not exist at com-

mon law and specifies the time during which the right shall exist, or the period in which an action can be brought, it is binding on the U.S." It cites *Denver and R.G.R. Co. v. U.S.*, 241 F.614, where the U.S. sued a railroad pursuant to a State statute imposing liability without fault for damage caused by fire, the decision stating in part:

> "There has been no legislation by Congress providing a right of action in cases of this character; therefore, if the plaintiff can recover at all, the right to do so must exist by reason of some statute of the State or by virtue of some common law rule adopted by the State or recognized by its courts authorizing a recovery in such cases . . . The statute . . . creates . . . a cause of action which did not exist at common law. The statute provides that suit must be brought within two years and we think a failure to bring the suit within the time prescribed by statute acts as a limitation of the liability itself and in this respect differs from the ordinary statute of limitations which affects the remedy only. We do not deem it necessary to do more than call attention to one or two of the many cases where this question has been before our Courts. In *Davis v. Mills*, 194 U.S. 451 . . . the court said: 'The ordinary limitations of actions are treated as laws of procedure and as belonging to the lex fori, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by reasonable distinction, the courts have been willing to treat limitations of time as standing as other limitations and cutting down the defendant's liability wherever he is sued. The common case is where the statute creates a new

liability and in the same section or in the same act limits the time within which it can be enforced whether using words or condition or not.'"

Accord: *U.S. v. Eytcheson*, 237 F.Supp. 371 (DC Mont. 1965), *United States v. Magnolia Motor and Logging Co.*, 208 F.Supp. 63 (DC Cal. 1962), *Flintkote Co. v. United States*, 47 F.R.D. 322 (S.D.N.Y. 1969), *Adams v. Albany*, 80 F.Supp. 876.

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3. THE DISTINCTION BETWEEN NON-CLAIMS STATUTES AND STATUTES OF LIMITATIONS IS NOT ONE OF FORM BUT OF SUBSTANCE.

Whereas minority of the claimant, or absence of the tort-feasor from the State will toll a statute of limitations, the contrary is true with respect to Uninsured Motorist statutes, *Republic Indemnity Co. v. Barn Furniture Mart*, 248 C.A.2d 517, 56 C.R. 609, *Pacific Indemnity Co. v. Ornellas*, 269 C.A.2d 875, 75 C.R. 608. An ordinary statute of limitations will not commence to run until the claimant sustains an injury, and in many instances until the claimant discovers the injury, the contrary being true with respect to Uninsured Motorist insurance coverage, e.g., *Firemen's Insurance Co. v. Disken*, 255 C.A.2d 502, 63 C.R. 177, where the insured had no cause of action against his Uninsured Motorist coverage until the tort-feasor's insurance carrier became insolvent, and same did not become insolvent until more than a year after the accident, the UMI claim being nonetheless held not to "accrue" within the one year period.

CONCLUSION

For the reasons stated in the above Brief, the Petition for a Writ of Certiorari, in this case, should not be granted.

Dated, San Francisco, California,
October 5, 1972.

Respectfully submitted,
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